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March 20, 1998

Via Telecopier

The Honorable Lewis Hall Griffith
The Honorable Jeffrey S. Gulin
The Honorable Edward Dreyfus
c/o Gina L. Giuffreda, Esq.
Copyright Arbitration Royalty Panel
Library of Congress
P.O. Box 70977
Southwest Station
Washington, D.C. 20024

Re: In the Matter of Adjustment of the Rates
for Noncommercial Educational Broadcasting
Compulsory License, Docket No. 96-6 CARP NCBRA

Dear Judges Griffith, Gulin and Dreyfus:

During the hearings held in this proceeding on March 9, 1998, the attorneys for ASCAP and the Public Broadcasters each requested an opportunity to present their views in writing as to the admission into evidence before the CARP of two documents. The documents proffered by Public Broadcasters were respectively marked for identification as "PB Exhibits 7X and 8X." Tr. 335-36.

The documents are both joint proposals made to the Librarian of Congress in this same docket by: (1) ASCAP, the National Federation of Community Broadcasters ("NFCB") and the National Religious Broadcasters Music License Committee ("NRBMLC") (the "ASCAP/NFCB/NRBMLC Proposal") (PB7X) and (2) ASCAP and The American Council on Education ("ACE") (the "ASCAP/ACE Proposal") (PB8X).

The ASCAP/NFCB/NRBMLC Proposal (PB7X) proposes compulsory license fees under Section 118 of the Copyright Act for certain noncommercial community radio stations that

are not operated by colleges and universities, not members of National Public Radio ("NPR") and not otherwise licensed by ASCAP. Similarly, the ASCAP/ACE Proposal (PB8X) proposes compulsory license fees under Section 118 for certain radio stations licensed to colleges and universities and not otherwise licensed by ASCAP.

Both Proposals state: that they are "being made on a non-prejudicial and non-precedential basis" to resolve the matter without litigation; that the Proposals are "arbitrary"; and, that they do "not reflect any assessment by any party of the absolute or relative value of the right of performance of music in the ASCAP repertory. . . ."

Notwithstanding the foregoing language, Public Broadcasters offer the Proposals as evidence in this proceeding. They seek to justify their offer by referring to Section 118(b)(3) which states that: "In establishing such rates and terms the Librarian may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2)."

Neither of these Proposals are "voluntary license agreements" as set forth in Section 118. Moreover, their introduction will violate clear Congressional policy to encourage settlements and avoid litigation in matter arising under Section 118. Accordingly, we urge the Panel to reject their introduction into evidence and inevitable misuse by Public Broadcasters.

DISCUSSION

I.

THE PROPOSALS ARE NOT "VOLUNTARY LICENSE AGREEMENTS" UNDER SECTION 118.

Entitled a "Joint Proposal," the ASCAP/NFCB/NRBMLC Proposal (PBX7) expressly recognizes itself as not a voluntary agreement within the meaning of Section 118(b)(2):

> As in 1987 and 1992, ASCAP, NFCB and NRBMLC are making this joint proposal to the Librarian, rather than entering into a voluntary agreement. . . Accordingly, any voluntary license agreement into which ASCAP, NFCB and NRBMLC might enter, pursuant to 17 U.S.C. §118(b)(2), would not serve to resolve these proceedings insofar as all community radio stations are concerned. (ASCAP/NFCB/NRBMLC Proposal (PBX7) at 5-6.)

The same is true of the joint proposals made by these parties in 1987 and 1992. See id. at pages 3-4 ("[w]e made that joint proposal [in 1987], rather than submit a voluntary agreement;" "we made that joint proposal [in 1992], rather than submit a voluntary agreement").

The ASCAP/ACE Proposal (PBX8) contains similar language and also states that the parties thereto did not intend their proposal to constitute a voluntary license agreement under Section 118(b)(3):

> As in 1987 and 1992, ASCAP and ACE are making this joint proposal to the Librarian, rather than entering into a voluntary agreement . . . Accordingly, any voluntary license agreement into which ASCAP and ACE might enter, pursuant to 17 U.S.C. § 118(b)(2). . . . (ASCAP/ACE Proposal (PBX8) at 6.)

The proposals made by ACE and ASCAP in both 1987 and 1992 include the same disclaimers. See id. at 3-4 ("In the 1987 Noncommercial Broadcasting Rate Adjustment Proceeding. . . ASCAP and ACE made a joint proposal . . . rather than submit a voluntary agreement;" "ASCAP and ACE also made a joint proposal [in the 1992 rate adjustment proceeding] rather than submit a voluntary agreement").

By contrast, the draft regulations to be promulgated by the Copyright Office (the "Office") that accompanied these proposals specifically provided that any voluntary license agreements which the parties chose to enter into would apply in place and instead of the rates and terms proposed by the parties and subsequently adopted by the Librarian:

> (b) Voluntary license agreements. Notwithstanding the schedule of rates and terms established in this section, the rates and terms of any license agreements entered into by copyright owners and noncommercial radio stations within the scope of this section concerning the performance of copyrighted musical compositions, including performances by noncommercial radio stations, shall apply in lieu of the rates and terms of this section.

See Appendix A to ASCAP/NFCB/NRBMLC Proposal (PBX7); see also Appendix A to ASCAP/ACE Proposal (PBX8) (voluntary license agreements to apply "in lieu of the rates and terms of this section").

Section 118 explicitly distinguishes between "proposals" and "voluntary license agreements." Proposals are dealt with in Section 118(b)(1); procedures regarding voluntary license agreements are codified at Sections 118(b)(2) and (3).

Following the statute, the Office has recognized that these Proposals: (a) were not voluntary license agreements under Section 118(b)(2) or (3), and (b) have non-precedential value. After these Proposals at issue were filed with the Office, the Office and Librarian submitted them for public notice and comment. 62 Fed. Reg. 63502 (November 18, 1997). That notice stated: "[T]he Librarian recognizes that the joint proposals do not reflect any assessment by any of the parties of the absolute or relative value of the right of performance of music in the ASCAP . . . repertory. . . ." Id. at 63504. In its Federal Register notice of January 14, 1998, the Librarian (upon recommendation of the Office) adopted the regulations. 63 Fed. Reg. 2142 (Jan. 6, 1998). Therefore, the rates and terms governing ASCAP, the NFCB and the NRBMLC, and ASCAP and ACE, are in effect through adoption of the Proposals by the Librarian, not by virtue of the parties' "voluntary agreement."

In the Federal Register notice adopting the rates and terms, the Office reviewed the background of Section 118 and concluded:

> Accordingly, interested copyright owners and users of these works may file either a voluntary agreement or a joint proposal outlining the adjustments to the terms and rates for the section 118 license . . . A joint proposal differs significantly from a voluntary settlement. The parties to a voluntary agreement represent all parties who would be affected by the agreement and the parties have the authority to bind their members. In a joint proposal, the parties to the agreement do not represent all persons who would be affected by the agreement, or if they do, at least one of the parties does not have the authority to bind its members." (Id. at 2143.)

II.

NOTHING PRECLUDES PARTIES FROM WAIVING USE OF THEIR AGREEMENTS AS PRECEDENT UNDER SECTION 118.

Section 118(b)(1) provides that in establishing rates and terms the Librarian shall proceed on the basis of the "proposals submitted." Similarly, Section 118(b)(3) provides that in establishing rates and terms, a panel may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in Section 118(b)(2). However, whether or not the proposals can be characterized as voluntary license agreements, as a matter of law, parties may, and did in PBX7 and PBX8, contractually agree to waive their consideration in the setting of future rates and terms. See, e.g., U.S. v. Mezzanatto, 513 U.S. 196 (1995) (follows Shutte v.

Thompson, 82 U.S. (Wall.) 151 (1872), upholding the presumption that statutory provisions may be waived by voluntary agreement of parties); In re EVCCO Leasing Corp., 828 F.2d 188, 193 (3d Cir. 1987)(citing Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)(well settled that a party may waive statutory provisions intended for the party's benefit).

Nothing in Section 118 precludes parties from waiving any right they might have in either Section 118(b)(1)'s provisions regarding consideration of proposals, or seeking enforcement of Section 118(b)(3)'s provisions regarding consideration of voluntary license agreements. Where, as here, the governing statute does not preclude, the waiver must be enforced unless the waiver contravenes some overriding public policy. See, e.g., Office and Professional Employees Int'l Union, Local 2. v. Washington Metro. Area Transit Auth. ("WMATA"), 552 F. Supp. 622 (D.D.C. 1982), aff'd, 713 F.2d 865 (D.C. Cir.), and opinion issued, 724 F.2d 133 (D.C. Cir. 1983); Restatement 2d of Contracts § 178. Certainly, there is no overriding public policy rationale for overriding ASCAP's waiver as reflected in PBX7 and PBX8. See, e.g., Millmaster Int'l Inc. v. United States, 427 F.2d 811 (C.C.P.A. 1970)(waiver upheld where court held rights granted under statute were intended for the benefit of private parties not the public in general); In re EVCCO Leasing Corp., 828 F.2d 188 (3d Cir. 1987)(same); WMATA, 552. F. Supp. at 622 (waiver upheld where a result of arms-length bargaining; enforcement of waiver supported by public interest in speedy resolution of disputes).

III.

THE RELEVANT PROVISIONS OF SECTION 118(b)(3) ARE PERMISSIVE, NOT MANDATORY.

Unlike Section 118(b)(1) which uses mandatory language with regard to proposals ("The Librarian of Congress shall proceed on the basis of the proposal submitted")(emphasis added), Section 118(b)(3) provides that the Panel "may" consider the rates for comparable circumstances under voluntary license agreements. Therefore, the latter subsection is permissive and does not even require the Panel to consider any such voluntary license agreements. Indeed, where Congress intended to mandate consideration by CARPs of certain information under the various compulsory licenses, Congress certainly knew how to use the appropriate language. See, e.g., Section 119(c)(3)(D) ("the Panel shall base its decision"); Section 801(b)(1)("rates applicable under sections 114, 115, and 116 shall be calculated to achieve the following objectives") (emphasis added).

In fact, this very language was present in the statute when it was enacted so Congress could not have known if there would be any such voluntary license agreements in effect to which the CRT or any future panel could turn. Thus, aside from the statute's plain language,

the legislative intent is clear on that issue as well.[1]

If Congress thought the Panel necessarily had to review voluntary license agreements in order to make a determination under Section 118 they simply would have said so. However, Congress did not and no reason exists to doubt that Congress simply meant what it said. See Report of the Panel, In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP-SRA, at 16 ("we find no support for the proposition that Congress did not mean what it said [in Section 119]").

Indeed, in setting rates and terms under Section 118, the Panel can be guided by the legislative history of the 1976 Copyright Act of which there is already evidence in this proceeding. Section 802(c) requires the Panel to be guided by prior CRT decisions as well, including the prior 1978 decision which ASCAP introduced into evidence and which its economist used as an alternative basis for ASCAP's proposed fee. The parties also have introduced volumes of additional evidence to guide the Panel in making its determination.

The Panel is charged with determining "reasonable terms and rates" here under Section 801(b)(1). Merely because the Panel may not look to ASCAP's Proposals as a comparable "voluntary" agreement, does not mean that the Panel is without evidence upon which to fix "reasonable rates and terms." ASCAP has presented evidence of other voluntary agreements for use of its repertory and the market value paid for such access, adjusted by its music use data. ASCAP urges the Panel to look to the breadth of other available evidence upon which to base its decision, and respect ASCAP's right to not have its Proposals used for any purpose.

IV.

THE CARP RULES PROVIDE FOR ASCAP'S OBJECTIONS.

As is the case in any adjudicatory proceeding, proffered documents are not automatically admissible into evidence merely because they are "official" or "public." Likewise, under the CARP rules that govern this proceeding, 37 C.F.R. § 251, et seq., the fact that official notice "may" be taken is not sufficient. For example, Rule 241.47(f) allows parties to raise

[1]Counsel for Public Broadcasters' maintains that these "proposals" are the only "contemporaneous" voluntary license agreements in effect to which the Panel can turn. Tr. 331-32, 363. But, there is no requirement either in the statute or its legislative history that the voluntary license agreements referred to in Section 118(b)(2) are to be "contemporaneous."

objections to evidence "on any proper ground." Rule 241.47(g) provides that all written testimony and exhibits will be received into the records "except any to which the panel sustains an objection." (Emphasis added.) Rule 251.48(a), titled, "*Admissibility*", further states that evidence that is not unduly repetitious or cumulative as well as relevant and material may be admissible.

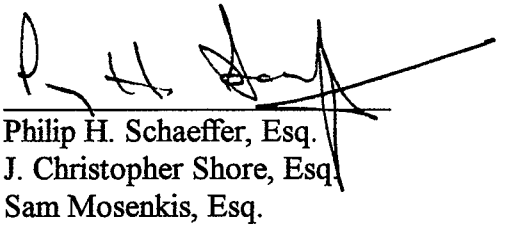
Nor is Rule 241.48(c) inapposite. Rule 241.48(c) allows parties to introduce documents already on file with the CARP and the Office into evidence by referencing them rather than producing physical copies, precisely because the copies are already on file. Rule 251.48(c) does not confer any substantive right to a party to introduce such documents as evidence. Rather, Rule 251.48(c) is merely is just a rule of convenience to avoid production of documents on file with the Office; it does not preclude substantive objections to admission.

* * *

For the foregoing reasons, we respectfully request that the Panel issue an order precluding admission of the Proposals into evidence in this proceeding.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS



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Docket No. 96-6 CARP NCBRA [3/19/98]
PBs' response to ASCAP/BMI objections to admission of prior joint proposals

Docket No. 96-6 CARP NCBRA [3/20/98]
BMI letter re objections to admission of joint proposals w/NRBMLC

Docket No. 96-6 CARP NCBRA [3/20/98]
ASCAP letter re objections to admission of joint proposals w/NFCB/NRBMLC & ACE